(3)

No. 87-1158

In the

Supreme Court of the United States.

OCTOBER TERM, 1987.

FRANK FORASTIERE, CHAIRMAN OF THE BOARD OF FIRE COMMISSIONERS OF SPRINGFIELD,
PETITIONER,

v.

RICHARD J. BREAULT,
RESPONDENT.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE MASSACHUSETTS SUPREME JUDICIAL COURT.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

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Now comes respondent, Richard J. Breault, and respectfully requests that this Honorable Court deny the petition of Frank Forastiere, former Chairman of the Board of Fire Commissioners of Springfield, Massachusetts, that a Writ of Certiorari issue to review the Massachusetts Supreme Judicial Court's decision in the case of *Breault* v. *Chairman of the Board of Fire Commissioners of Springfield,* 401 Mass. 26 (1987). This case presents no special circumstances or important reasons for the Court to exercise its discretion to review.

I. The Decision of the Massachusetts Supreme Judicial Court Is in Accord with the Decisions of This Court.

The facts of this case as found by the trial court and the Supreme Judicial Court are that the respondent Richard J. Breault was a firefighter for the City of Springfield, Massachusetts (hereinafter referred to as the "City"). He took an unpaid leave of absence pending the resolution of criminal charges against him rather than face a risk of immediate, permanent termination under the civil service laws.

A jury acquitted Mr. Breault of all criminal charges against him. In June 1981, Breault applied for reinstatement to the Board of Fire Commissioners of Springfield, a body charged with hiring and firing firefighters in conformance with the Massachusetts civil service laws. Massachusetts General Laws, Chapter 31, Section 37 (G.L. c. 31, § 37) in part provides that:

> Any person who has been granted a leave of absence . . . pursuant to this section *shall* be reinstated at the end of the period for which the leave was granted. . . .

(Emphasis added.)

At an August 4, 1981 meeting, the Fire Commissioners failed to reinstate Breault to his job as a firefighter. Instead, the Chairman of the Board of Fire Commissioners, Frank A. Forastiere, requested that Mr. Breault sign a statement that "he would not bring any claims against the City or the Fire Department" or resolve his claims against the City before he could be considered for reinstatement. The Fire Commissioners reinstated Breault on November 23, 1981, but only after an attorney intervened on Breault's behalf (S.J.C. decision, 401 Mass. at 28-29; Pet. App. 3a-4a).

Mr. Breault then brought suit against the City and Chairman Forastiere under 42 U.S.C. § 1983, alleging *inter alia* that he was denied rights and privileges under the First, Fifth and Fourteenth Amendments to the Constitution of the United States. Chairman Forastiere brought a Motion for Determination of Qualified Immunity. The trial court ruled that Forastiere was not entitled to qualified immunity. Forastiere filed an interlocutory appeal to the Massachusetts Appeals Court. The Supreme Judicial Court, on its own motion, reviewed the decision of the trial court.

The Supreme Judicial Court, in its review of the trial court's determination of qualified immunity, assiduously applied the standards set out by this Court in *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), *Davis* v. *Scherer,* 468 U.S. 183 (1984), and *Anderson* v. *Creighton,* U.S. , 107 S.Ct. 3034 (1987). In following these precedents, the Supreme Judicial Court held that government officials performing discretionary functions are entitled to immunity if, at the time of the challenged action, the statutory or constitutional right allegedly violated was not clearly established (S.J.C. decision, 401 Mass. at 26; Pet. App. 3a).

The Supreme Judicial Court concluded that qualified immunity was not available because Forastiere was called upon to act only in a ministerial, not a discretionary, capacity — Forastiere had no discretionary authority to withhold reinstatement. Specifically, the court, applying the standard for discretionary function set out in *Davis* v. *Scherer, supra* at 196-197 n.14, found that the language of G.L. c. 31, § 37 mandated reinstatement in every instance where the terminus of the leave is clearly determinable from the terms of the grant (S.J.C. decision, 401 Mass. at 33-34 n.8; Pet. App. 9a).

The decision of the Supreme Judicial Court that qualified immunity was not available because Mr. Forastiere was performing a ministerial function in no way conflicts with the

decisions of this Honorable Court. As recently as its 1987 decision in *Anderson* v. *Creighton, supra,* and 1988 decision in *Forrester* v. *White,* U.S. , 56 U.S.L.W. 4067 (U.S. Sup. Ct., Jan. 12, 1988), this Court reaffirmed the proposition that qualified immunity was available only to government officials performing *discretionary functions. Anderson* v. *Creighton, supra,* 107 S.Ct. at 3038; *Forrester* v. *White, supra,* 56 U.S.L.W. at 4069.

II. The Finding of Fact of the Supreme Judicial Court That Chairman Forastiere Was Performing a Ministerial Function Mandated by a Massachusetts Statute Is Supported by Substantial Evidence.

The Supreme Judicial Court of Massachusetts, the Massachusetts court of last resort, stated that Massachusetts General Laws c. 31, § 37, "mandat[ed] reinstatement in *every* instance where, as here, the terminus of the leave is clearly determinable from the tems of its grant." (S.J.C. decision, 401 Mass. at 34 n.8; Pet. App. 9a.) That court interpreted the language of the Massachusetts statute, "[h]aving in mind both 'the ordinary and approved usage' of this language, as well as the 'object to be accomplished'" (S.J.C. decision, 401 Mass. at 33; Pet. App. 8a.) under Massachusetts law. That is a final and binding interpretation of Massachusetts law.

This Court has held that, even in cases involving invasion of constitutional rights, findings of fact supported by substantial evidence need not be reexamined as long as "the state court applied the correct standards to the case." *Container Corp. of America* v. *Franchise Tax Bd.,* 463 U.S. 159, 176 (1983). The reasons for this is:

> It will do the cause of legal certainty little good if this Court turns every colorable claim that a state

> court erred in a particular application of those principles into a *de novo* adjudication, whose unintended nuances would then spawn further litigation and an avalanche of critical comment.

Id. (footnote omitted).

In fact, at deposition, Forastiere himself testified that, at the time of Breault's application for reinstatement to his job, Forastiere believed that the Fire Commissioners had no option available other than reinstating Breault (Deposition of Frank Forastiere, see Attached Supplemental Appendix at 2a, page [34], lines 1-10).

II. The Discretionary/Ministerial Function Distinction Is a Viable and Workable Legal Standard.

The discretionary/ministerial function distinction is a long-standing workable legal rule. This distinction effectively helps maintain the delicate balance between, on one hand the mandate of the Fourteenth Amendment and the post-Civil War civil rights acts to protect individual liberties against government encroachment and, on the other hand, the need to protect government officials from insubstantial claims. See *Harlow* v. *Fitzgerald, supra,* 457 U.S. at 813-184.

This Court recently again stated that qualified immunity is available only when officials make discretionary decisions. *Forrester* v. *White, supra,* 56 U.S.L.W. at 4069. Furthermore, this Court recently unanimously upheld a rule limiting an immunity for government officials to discretionary acts by these officials. *Westfall* v. *Erwin,* U.S. , 56 U.S.L.W. 4087 (U.S. Sup. Ct., Jan. 13, 1988). Although the legal issues in the *Westfall* case differ from the issues in the present case, this Court in *Westfall* did reaffirm the continuing vitality of

the discretionary/ministerial distinction in claims of official immunity. The court's reasoning in *Westfall* applies equally to the present case:

> The central purpose of official immunity, promoting effective Government, would not be furthered by shielding an official from state-law tort liability without regard to whether the alleged tortious conduct is discretionary in nature. . . . It is only when officials exercise decisionmaking discretion that potential liability may shackle "the fearless, vigorous, and effective administration of policies of government."

Id., 56 U.S.L.W. at 4088 (citation omitted).

Since 42 U.S.C. § 1983 itself admits of no immunities or defenses, it is ludicrous to claim that common law concepts of immunity have no place in the legal analysis of the question. In fact, the common law legal concepts of immunity are the source of the doctrines of absolute and qualified immunity. As this Court has stated:

> Although the statute [§ 1983] on its face admits of no immunities, we have read it "in harmony with general principles of tort immunities and defenses rather than in derogation of them."

Malley v. *Briggs*, U.S. , 106 S.Ct. 1092, 1095 (1986) (citation omitted).

In addition, the discretionary/ministerial function distinction has long existed and been very workable under the Federal Tort Claims Act (28 U.S.C. § 2680(a)).

The discretionary/ministerial distinction in *Harlow* seeks to prevent abuses permitted by the former "subjective" good faith test under which insubstantial claims could be brought to trial by merely alleging "malice." 457 U.S. at 816-817. Such cases potentially disrupt effective government in the area of traditionally protected policy-making "discretionary functions." The Court stated:

> In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by the decisionmaker's experience, values and emotions.

Id. at 816.

Thus, the Court applied the so-called "objective" or clearly-established tests for discretionary functions to prevent excessive disruption of government policy-making and at the same time protect the "public interest in deterrence of unlawful conduct and in compensation of victims. . ." *Id.* at 819. The Court recognized these same policy objectives do not require the court to insulate ministerial decisions. See *Westfall* v. *Erwin, supra,* 56 U.S.L.W. at 4088.

Under this standard, officials are still protected against insubstantial claims arising out of ministerial acts. The official can move for summary judgment. The plaintiff must provide sufficient evidence of a violation of constitutional rights, which in turn requires proof that the defendant acted with the requisite knowledge or intent to deprive him of these rights.

While the decisions of the Seventh Circuit in *Coleman* v. *Frantz,* 754 F.2d 719, 727-728 (7th Cir. 1985) questions the viability of ministerial/discretionary distinction, that court's use of the so-called "objective circumstances test" in effect limits

qualified immunity to "instances where the official's duties may be characterized as 'discretionary' . . ." *Id.* at 729 n.12.

Conclusion.

For the reasons stated above, the petition of Frank A. Forastiere for a Writ of Certiorari should be denied.

Respectfully submitted,

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Appendix.

RELEVANT PORTIONS OF TRANSCRIPT OF DEPOSITION OF FRANK FORASTIERE.

[33] Q. What specifically did you ask him in that regard?
A. I asked him if he felt that he had any claims against the City for back pay.
Q. And why did you ask him that?
A. Over the period of time from when he was found vindicated of his charges and his request, there had been some mention that he was concerned about his back pay and I was interested in finding out what his feelings were on that.
Q. Who had mentioned that?
A. Several people had mentioned it to me. Specifically I don't know. I come in contact with many people with the department or did at that time. It was like the rumor around, which I don't generally respond to rumors, but since he was there, I was interested.
Q. Did you have any feelings on the issue of back pay at the time?

MR. CARROLL: I object to the form of the question.

THE WITNESS: I think I was interested in what his feelings were on an informational basis.

Q. (By Mr. Katz) Was it —
A. It was sort of the businessman in me.
[34] Q. Was it an issue that you intended to take into consideration in acting on his application to return to active duty?

MR. CARROLL: I object to the question.

THE WITNESS: I felt that there were no options to the board except to rehire him because of his qualifying, the way he qualified, and the Civil Service Requirements that we work under.

Q. (By Mr. Katz) Did you have an opinion as to whether he might be entitled to back pay?

MR. CARROLL: I object to that.

THE WITNESS: I don't think so.

Q. (By Mr. Katz) Do you recall anything else being asked of Mr. Breault at that meeting?

A. No, I don't.

Q. Did you ask him anything about whether he had taken his initial leave of absence voluntarily?

A. I may have.

Q. And what was the purpose of asking him that?

A. I don't recall the purpose of that question, if I asked him.

Q. Did you have any information or rumor in [end of page]